Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALLEN DEBORD and DEBRA DEBORD, Individually and as next friends for KELLY DEBORD, Minor,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE FERGUSON-FLORISSANT SCHOOL DISTRICT, SHIRLEY SALMON, JOYCE DREIMEIER, and CINDY ORMSBY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do Speculative Concerns about Harm to the Student and Liability to School District Personnel Excuse A School District from Its Obligations under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act to Make Reasonable Modifications of Its Policies in Order to Accommodate a Student's Disability?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 126 F.3d 1102 (8th Cir. 1997) and is reprinted in the Appendix. (App. A, A-1). The denial of reconsideration by the panel and the court en banc is reprinted in the Appendix. (App. B, A-2). The memorandum decision of the United States District Court for the Eastern District of Missouri (Jackson, J.) granting Defendants' Motion for Summary Judgment is unreported and is reprinted in the Appendix. (App. C., A-10).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit entered its judgment on September 11, 1997. Petitioners sought rehearing by the panel and rehearing en banc. The petition for rehearing was denied on November 14, 1997. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 504 of the Rehabilitation Act, 29 U.S.C. §794(a), provides in relevant part:

> (a) No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Title II of the Americans with Disabilities Act, 42 U.S.C.§12131(2) provides:

> (2) The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Title II regulation, 28 C.F.R. 35.130(b)(7), provides that covered entities must:

> make reasonable modifications in policies . . . when the modifications are necessary to avoid discrimination on the basis of a disability unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service.

STATEMENT OF THE CASE

The board of education of a public school district and certain individuals ("Respondents" or "District") have refused to give Petitioner Kelly DeBord, a minor child with a disability under the applicable laws, the prescribed medication that her condition requires so that she can learn at school.

Kelly, now a third grade student at Robinwood Elementary School in the Ferguson-Florissant School District, St. Louis County, Missouri, has been under the care of pediatrician Dr. Sheldon Kessler since her birth on March 8, 1989. In 1993, Dr. Kessler diagnosed Kelly, then four years old, with severe Attention Deficit Hyperactivity Disorder ("ADHD"). Dr. Kessler's diagnosis was confirmed by Dr. David Guckas, Ph.D. Dr. Kessler, a pediatrician specializing in the treatment of ADHD who authored "Drug Therapy in Attention Deficit Hyperactivity Disorder," *Southern Medical Journal* (Jan. 1996), has successfully treated Kelly with sustained release Ritalin SR ("Ritalin").

During the course of treating Kelly's ADHD, Dr. Kessler prescribed 100mg of Ritalin upon her rising in the morning and 40mg of Ritalin at 3:30 p.m., after Kelly was home from school, in order to keep the level of Ritalin in her system up at an effective level. Kelly benefited from this dose level and experienced no harmful effects. Just prior to February 14, 1996, Dr. Kessler moved Kelly's 40mg afternoon dose to 3:00 p.m., when Kelly is still in school, because the 3:30 p.m. dose was no longer as effective. As Respondents admitted, Kelly has never displayed any adverse effects from this dosage of Ritalin.

Respondent Joyce Dreimeier, a school nurse, refused to give Kelly her prescribed medication at 3:00 p.m. On February 15, 1996, she informed Mrs. DeBord by telephone that she would not administer the afternoon 40mg Ritalin dose to Kelly because her daily dose would then exceed the 60mg daily recommendation listed in the Physician's Desk Reference ("PDR") for Ritalin. Dr. Kessler provided the school with information on Kelly's condition and verified the safety and necessity of the dosage and timing of the Ritalin. Respondents, including the nurse, continued to refuse to administer the 40mg Ritalin to Kelly. Respondent nurse admitted that she is not licensed to practice medicine or to diagnose and treat patients, has had only one class in pharmacology at least 13 years ago, has only a "passing familiarity" with Ritalin, and is not aware of any studies reporting adverse effects from long-term use of high doses of Ritalin. In addition, the Respondents, including the nurse, admitted that the foreword of the PDR expressly states that the FDA "does not . . . limit the manner in which a physician may used an approved drug."

Respondents refused to modify a District policy of "never knowingly" administering a dose of medication that exceeds the PDR daily recommendation even where such policy admittedly prevents a disabled student, here Kelly, from receiving the medication necessary to accommodate her disability. Respon-

dents admitted that their policy of not administering medication doses that exceed PDR recommendations has the effect of treating Kelly differently than all other children in the District who receive prescribed daily doses of medication. Kelly is the only student, among 442 children in the District who receive daily doses of Ritalin from the school nurses, not given her medication. Respondent nurse admitted that she would never accommodate a student requiring an above-PDR dose "regardless of the student's alleged disability [or] degree of alleged disability." However, Respondents' own physician consultant, Dr. Garrett Burris, admitted that in unusual cases a child-patient may require up to 300mg of Ritalin daily.

Other doctors agreed that some patients need a higher-than-usual dose of medication. Dr. Simon Horenstein, who examined Kelly, concluded that the Ritalin dose given Kelly is safe, effective and necessary and that her treatment should not be limited by the dosage level listed in the PDR. Dr. Horenstein, a professor emeritus of child and adult neurology at Saint Louis University, testified at the preliminary injunction hearing that Kelly has ADHD, shows no harmful effects from her high dose of Ritalin, and was doing quite well on such a dose. Dr. Horenstein testified that there are many other medications where "off-label" (off-PDR) use may occur, including exceeding the recommended range of phenytoin for epilepsy; prescribing the anticonvulsant valporic acid for the off-label use of treating mania; and prescribing the anti-hypertensive clonidine for the off-label use of treating ADHD. He noted that exceeding the PDR recommendation may not only be a proper but essential treatment of the individual, particularly with Ritalin SR because of its variable absorption rate by patients. Dr. Till Davy testified, after reviewing Kelly's medical records, that high dose use of Ritalin SR may be necessary for some patients and, that, as long as no adverse effects are noted, the dose may be increased until the optimum benefit is reached. He is personally familiar with cases where children have benefited from up to 650mg of Ritalin

per day with no harm to the patient. He noted that the PDR was never intended to restrict the physician's treatment prescriptions and that the school nurse should administer the medication without concern once she has verified the prescription's accuracy and safety with the treating physician.

Affidavits from other medical experts further supported the safety and necessity of high dose use of stimulant medication such as Ritalin to treat ADHD in certain individuals. Dr. Charles Popper, Harvard University Department of Psychiatry faculty member and the founder and editor of the *Journal of Child and Adolescent Psychopharmacology*, attested that high doses of Ritalin may be necessary and that the PDR is not intended by the FDA to function as limits on medication doses selected by clinicians. In his opinion, high dose use of Ritalin, where the therapeutic benefit occurs without adverse effects, would actually be a "routine" course of treatment. Dr. C. Keith Conners, an ADHD expert in the Duke University Psychiatry Department, submitted an affidavit which agreed with the conclusions of Drs. Horenstein, Davy and Popper.

Respondents offered no evidence of harm to Kelly or any child from the long-term use of Ritalin in high doses or otherwise. Respondents offered no evidence to counter Kelly's demonstrated need for and benefit from her particular dose of Ritalin. Respondents offered no evidence to counter Petitioners' evidence that doctors may prescribe medications at dosage levels in the best interests of their individual patients regardless of PDR recommendations. Respondents offered no evidence to support their speculative concerns of harm to the child or personal liability for the nurse if Kelly received her medication as prescribed. Respondents offered no evidence to counter that the District's PDR-limit policy singles out a particular group of students for less favorable treatment — those whose disabilities require particular medications and/or dosages of medication outside uses recommended in the PDR.

Respondents never challenged the DeBords' requested modification of the PDR-limit policy as "unreasonable" by asserting either of the two recognized affirmative defenses: undue administrative or financial burden, or fundamental alteration in a program. Respondents never offered to modify the District's policies to accommodate Kelly once the safety and efficacy of her prescribed Ritalin were verified. Instead, Respondents requested that the DeBords modify their lives so that Mrs. DeBord (or a designee) could give Kelly the Ritalin at school or pick her up early. The District also requested that Dr. Kessler modify his carefully titrated treatment of Kelly by changing the dosage or timing of the Ritalin.

In April 1996, the DeBords filed suit in the United States District Court for the Eastern District of Missouri, alleging violations of Title II, §504 and §1983. The District Court agreed with Petitioners that Kelly DeBord has a disability, ADHD, within the meaning of Title II of the ADA and §504, that Kelly needs her dose of Ritalin in order to learn, and that Respondents' concerns about harm and liability had sparse evidentiary support. The District Court granted summary judgment for Respondents, holding that their alternatives were reasonable as a matter of law and that their refusal to modify their PDR-limit policy based on their concerns of harm and liability did not constitute discrimination against Kelly. (App. C, A-10 - A-24).

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's grant of summary judgment. The Eighth Circuit recognized that school districts discriminate in violation of Title II and Section 504 when they fail to make reasonable modifications in policies in order to provide meaningful access to their programs. The Court further recognized that Respondents failed to raise an affirmative defense. The Court chose to ignore evidence that the PDR-limit policy prevents certain students from receiving their high-dose medications as prescribed to hold that the DeBords "have not tried to

show" that the District's PDR-limit policy "has the effect of discriminating against the disabled or the severely disabled." (App. B, A-6). The Court also chose to ignore the evidence that no deleterious effects from the long-term use of Ritalin have been documented to find that "no one knows what the long term effects of high doses of Ritalin may be." (App. B., A-8). Having ignored contrary evidence, the Eighth Circuit then made the factual finding, with no evidentiary support in the record, that the requested policy modification "would impose an undue administrative burden on the school district to verify the safety of an excess dosage in each individual case" and that, therefore, the DeBords' requested accommodation was "not reasonable." (App. B, A-8). The Court concluded that the District's stated concerns about harm and liability "might be speculative, but they are not unreasonable." (App. B, A-8). This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

The U.S. Court of Appeals For The Eighth Circuit Has Decided An Important Question Of Federal Law In A Way That Conflicts With Applicable Statutes And Relevant Decisions Of This Court And U.S. Courts Of Appeals.

The *Debord* case arises under two federal statutes, Title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. 12131 *et seq.*, and §504 of the Rehabilitation Act of 1973 ("§504"), 29 U.S.C. 794, which must be construed consistently with each other. *See, e.g., Pottgen v. MSHSAA*, 40 F.3d 926, 929-930 (8th Cir. 1994). The Eighth Circuit decision in *DeBord* conflicts with the reasoning of, *inter alia, Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712 (1985); *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371 (1984); *Arline v. School Board of Nassau County*, 480 U.S. 273, 107 S.Ct. 1123 (1987); *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S. Ct. 1196 (1991), as well as *Jeremy H. v. Mount Lebanon School District*, 95 F.3d 272, 278 (3d Cir. 1995); *W. B. v. Matula*, 67 F.3d 484 (3d Cir. 1995); *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir.), *cert. denied*, 118 S.Ct. 441 (1997); *Todd v. Ellins School Dist.*, 105 F.3d 663 (8th Cir. 1997), *Wynne v. Tufts University Sch. of Medicine*, 932 F.2d 19 (1st Cir. 1991), *cert. denied*, 507 U.S. 1030, 113 S.Ct. 1845 (1993); *Reagen v. Weaver*, 886 F.2d 194 (8th Cir. 1989); *Kohl v. Woodhaven Learning Center*, 865 F.2d 930 (8th Cir. 1989); and *Bentivegna v. U.S. Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982).

Speculative Concerns About Harm And Liability Cannot Excuse The Statutory Obligation To Make Reasonable Modifications Of Policies To Allow Individuals With Disabilities Meaningful Access To Programs And Services

Petitioner Kelly DeBord, who has ADHD, needs an unusually high dose of Ritalin in order to learn and otherwise lead a normal life. Notwithstanding Kelly's acknowledged need for and benefit from this medication, Respondents have refused to modify a school district policy of "never knowingly" giving a dose of medication outside the dose level recommended in the PDR. In so doing, Respondents are circumventing their statutory obligations under §504 and Title II. Respondents cite speculative concerns of possible harm to the child and potential liability to the nurse to support their refusal — concerns which this Court has rejected as invalid for justifying otherwise unlawful discrimination.

Title II, §504 and their implementing regulations require the school district, not the disabled student, to reasonably modify its policies to provide "meaningful access" to its programs and services. §12131(2); *Choate*, 469 U.S. at 301 & n. 21. "The benefit, itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled[.]" *Id.* at 301. *See also Wynne v. Tufts University Sch. of Medicine*, 932 F.2d 19, 25 (1st Cir. 1991)("there is a real obligation on the academic institution to seek suitable means of reasonably accommodating a handicapped person"); *Reagen v. Weaver*, 886 F.2d 194, 198 (8th Cir. 1989)(State of Missouri violated §504 by denying AZT to patients because they did not fit FDA-approved criteria).

The Eighth Circuit also engaged in impermissible fact-finding, based on nothing in the record below, in order to reach a decision favoring the District. If, as in this case, a school district

refuses to comply with its legal obligation to reasonably modify its policy to give a student meaningful access to its health services, it must assert either the affirmative defense of fundamental alteration of policy or the affirmative defense of undue administrative or financial burden. *Pottgen v. MSHSAA*, 40 F.3d 926 (8th Cir. 1994). Here, the District failed to assert either affirmative defense or even to present evidence on them. Nonetheless, the *DeBord* court, while acknowledging this deficiency in Respondents' case, improperly made the factual finding that modifying the PDR-limit policy by verifying the safety of a dose for a particular student would somehow be an "undue administrative burden" for the District, thereby making the DeBords' requested modification "not reasonable." (App. B, A-8). It rested its ruling on yet another factual finding, that, "[a]t this time, no one knows what the long term effects of high doses of Ritalin might be," wholly ignoring evidence submitted by Petitioners and never countered by Respondents that longitudinal studies show no deleterious effects from the long term use of Ritalin. The Eighth Circuit then acknowledged that Respondents' concerns were "speculative" but still found them "not unreasonable." (App. B, A-8).

The Eighth Circuit, like the Respondents, relied upon an archaic and factually unsupported understanding of Ritalin in order to rationalize Respondents' otherwise unlawful refusal to give Kelly her medication as prescribed. "'Individuals with handicaps are all too often excluded from school and education programs . . . because of archaic attitudes[.]'" *Mendez v. Gearan*, 956 F.Supp. 1520, 1527 (N.D. Cal. 1997), quoting S.Rep. 93-1297, 93d Cong. 2d Sess. 32. Where the decision-maker, the District, has excluded the disabled individual, Kelly DeBord, from a service without "carefully examining the relevant evidence regarding the disability and the likelihood of harm, a court must assume that the decision-maker based the exclusion on unfounded presumptions about the disability" — including, as

here, the medication necessary to treat the disability. *Mendez*, 956 F.Supp at 1527.

Contrary to the Eighth Circuit in *DeBord*, concerns about harm and liability are plainly invalid under the reasoning of this Court in *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371 (1984)(involving the predecessor to Individuals with Disabilities in Education Act or "IDEA"). In *Tatro*, the Court expressly recognized that school nurses "are authorized to dispense oral medications [to 'nonhandicapped children'] *in accordance with a physician's prescription.*" *Id.* at 3377-3378 (emphasis added). As to a school district's purported concerns about the

> numerous possibilities for *injury and liability*, . . . Congress assumed that *states receiving generous grants under the Act were up to the job of managing these new risks.* Whether [a district] decides to purchase more liability insurance or to persuade the State to extend the limitation on liability, *the risks imposed . . . should not prove to be a large burden. Id.* at n. 12. (Emphasis added.)

Although fully briefed, the Eighth Circuit ignored the edict of *Tatro* and the supporting, analogous reasoning of *Johnson Controls, infra.* Indeed, the *DeBord* court failed to address either of these Supreme Court cases at all. Yet, the Third Circuit and a different Eighth Circuit panel have recognized that *Tatro*, a case under IDEA, necessarily applies to interpretations of §504 because both laws seek to root out discrimination against students with disabilities and therefore must be construed consistently with each other. *See, e.g., W. B. v. Matula*, 67 F.3d 484 (3d Cir. 1995)("There appear to be few differences, if any, between the IDEA's affirmative duty and §504's [and the ADA's] negative prohibition . . . the regulations implementing §504 adopt the IDEA language requiring that schools . . . shall provide a free appropriate public education to each qualified handicapped

person"); *accord, Todd, supra* (8th Cir. 1997)[1] (construing IDEA regulations and Rehabilitation Act regulations consistently); *Jeremy H. v. Mount Lebanon School District*, 95 F.3d 272, 278 (3d Cir. 1995).

The Supreme Court further elaborated upon the irrelevance of the "harm and liability" defense in the analogously reasoned case of *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S. Ct. 1196 (1991). In rejecting the employer's argument that its policy barring women from lead-exposure jobs was designed to minimize both potential harm to fetuses and possible liability of the company for fetal injuries, this Court pointed out:

> If, under general tort principles, Title VII bans sex-specific fetal protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the *basis for holding an employer liable seems remote at best* . . . . When it is impossible for an employer to comply with both state and federal requirements, this Court has ruled that *federal law preempts that of the States*. . . . [To hold otherwise,] would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the [federal anti-discrimination] statute demands[.] *Id.* at 208-209. (Emphasis added.)

As with the employer in *Johnson Controls* who unlawfully relied on concerns about harm and liability to avoid its Title VII

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[1] Ironically, yet another Eighth Circuit panel recently held that the *Tatro* bright-line test between medical and non-medical "related services" requires a school district, under the IDEA, to provide a full-time nurse for a child whose disability requires daily catheterization and tracheostomies — procedures fraught with far more risk of harm to the child and liability to the nurse than administering a few Ritalin tablets to a child. *See Cedar Rapids Community School Dist. V. Garret F.*, 106 F.3d 822 (8th Cir. 1997).

obligation not to discriminate, the school district in *DeBord* cannot be allowed to hide behind admittedly speculative fears of harm and liability to avoid its obligation to reasonably modify its PDR-limit policy. The school district's totally unsubstantiated concerns cannot be allowed to "stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" in passing §504 and the ADA. *Id.* at 210 (citation omitted).

Courts in the First, Third, Ninth and Tenth Circuits, as well as another Eighth Circuit panel and the federal agency charged with enforcing the regulations of Title II and §504, have followed this Court's reasoning in concluding that concerns about harm and liability — particularly unsupported concerns — cannot excuse the obligation to make reasonable modifications of policies, including where necessary to give medication to a student, no matter how "reasonable" or "rational" these speculative concerns may appear. As the Ninth Circuit warned over fifteen years ago, "Any qualification based on risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at greater risk from . . . injuries." *Bentivegna v. U.S. Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982). Within the last year, a different panel of the Eighth Circuit rejected the employer's concerns about harm and liability as excusing its discriminatory treatment under the ADA of an employee perceived to have an alcohol problem. *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997).

In the Third Circuit, the court in *Grube v. Bethlehem Area School Dist.*, 550 F.Supp. 418, 424 (E.D.Pa. 1982) held that §504 requires school to grant request of one-kidney student to play football notwithstanding the risk of injury and liability. Similarly, the court in *Poole v. South Plainsfield Bd. Of Educ.*, 490 F.Supp. 948, 953 (D.N.J. 1980) denied the school board's summary judgment motion to dismiss student's §504 claim even

though that board's refusal to allow one-kidney student to wrestle was based on doctors' concerns of possible harm to the student and the school's fear of liability. A school "ha[s] neither the duty nor the right under §504 [to] impos[e] its own rational decision over the rational decision of the famil[y]." *Poole*, 490 F.Supp. at 953. *Accord, Wynne v. Tufts University Sch. of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991)(recognizing the "tension" between the "statutory rights of a handicapped individual" and "concerns for insulating officials from personal monetary liability"); *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372, 1383 (10th Cir. 1981)("The mere fact that the [entity] acted in a rational manner is no defense to an act of discrimination"). Concerns about harm and liability, no matter how sincere or paternalistic, cannot be used to avoid one's statutory obligation to provide a reasonable accommodation.

Likewise, the Office for Civil Rights of the U.S. Department of Education ("OCR"), the agency charged with enforcing the regulations of Title II and §504, has issued opinions which follow the reasoning of this Court in *Tatro* and *Johnson Controls* and in the cases cited above. OCR interpretations are entitled to substantial deference. *Rosa H. V. San Elizario Indep. Sch. Dist.*, 106 F.3d 648 (5th Cir. 1997). In *Berlin Brothersvalley (PA) School District*, OCR Region III, 353:124 (OCR, December 23, 1988), the OCR held that a school district which refused to administer prescribed medication violated §504 by having a policy which allowed the district the discretion not to administer prescribed medication to a student with a disability and required parents of handicapped students to sign a liability waiver in case the student were harmed. *See also Fairfield-Suisun (CA) Unified School District*, OCR Region IX (OCR, March 17, 1989) (§504 violations occurred where district refused to monitor ADHD student's noontime dose of Ritalin, failed to provide parents with notice of procedural safeguards required by § 504 regulations, failed to assess student's needs as required by §504 regulations,

and failed to provide a free appropriate public education because absence of Ritalin caused student's ADHD to interfere with his learning and ability to benefit from other parts of educational program).[2]

Archaic Reactions To The Particular Treatment Or Medication Necessary To Accommodate The Disability Can Constitute Discrimination Against The Disability Itself When The Individual With A Disability Is Denied Meaningful Access To Programs And Services Because Of Such Archaic Views

Further, entities cannot be allowed to push the otherwise invalid harm-and-liability excuse through a back-door by claiming it is merely reacting against the medication and not the disability, itself, when the evidence, medical and beyond, shows the inextricable link between the disability and medication at issue. Discrimination against the medically necessary medication, here, high-dose Ritalin, is discrimination against the disability, itself. In the instant case, the Respondent nurse reacted against the high-dose use of Ritalin despite strong medical evidence that it was safe, necessary and effective for this child. Her archaic, discriminatory, medically unsound reaction — embodied in the District's PDR-limit policy — prevailed, thereby allowing Respondents to avoid their express statutory duty to reasonably modify their PDR-limit policy in order to accommodate Kelly's disability.

As this Court noted in its landmark opinion on the scope of the Rehabilitation Act, "The Act is carefully structured to replace . . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and *medically sound* judgments." *Arline v. School Board of Nassau County*, 480 U.S. 273, 284, 107

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[2] These OCR opinions are contained in the record below which will be filed with this Court if petition for certiorari is granted. S.Ct.R. 26.

S.Ct. 1123 (1987) (emphasis added). Thus, one "may not require the person with the disability to be separated from the service [needed]" because of a rigid reading of a particular policy or because one does not happen to like the particular service required. *Johnson v. Gambrinus Company/Spoetzel Brewery*, 116 F.3d 1052, 1061 & n. 6 (5th Cir. 1997)(ADA required a modification of a "blanket no animals policy" at a brewery so that a visitor could be permitted to tour the facility with his guide dog, even though the policy was based on FDA-regulation to minimize contamination at breweries).[3] Other circuits, including the Eighth, have followed similar reasoning. *See, e.g., also Lori v. Vande Zande*, 44 F.3d 538, 543 (7th Cir. 1995)("a characteristic manifestation of an admitted disability is . . . a part of the underlying disability and hence a condition the [defendant] must reasonably accommodate"); *Teahan v. Metro-North Commuter Railroad Co.*, 951 F.2d 511, 516 (2d Cir. 1991)("[A]n employer 'relies' on a handicap when it justifies termination based on conduct caused by the handicap") ; *Reagen v. Weaver*, 886 F.2d 194, 198 (8th Cir. 1989)(State of Missouri violated §504 by denying AZT to patients whose doctors prescribed such treatment notwithstanding the possibly "experimental" nature of the drug involved); *Kohl v. Woodhaven Learning Center*, 865 F.2d 930, 935 (8th Cir. 1989)(in rejecting defendant's argument that its refusal to admit plaintiff was based on concerns other than his hepatitis-carrier status, the Court noted, "All these rationales . . . boil down to Kohl's being a carrier").

The *DeBord* court, nonetheless, apparently reasoned that reacting against the level of medication needed to accommodate a particular disability — based on wholly unsupported, speculative concerns about harm and liability — was not discrimination against the disability, itself. App. at 5. *See also Davis v. Francis*

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[3] *Johnson* involved Title III of the ADA. Title II and Title III of the ADA must be interpreted consistently with one another. *Innovative Health Sys., Inc. V. City of White Plains*, 117 F.3d 37, 47 (2d Cir. 1997).

Howell School District, 104 F.3d 204 (8th Cir. 1997)(same reasoning in legally and factually similar case). (App. B., A-5) (citing *Davis*). Such reasoning is at odds with decisions in the Second, Fifth, Seventh and Eighth cases cited above — that an entity cannot bypass its statutory obligation to reasonably modify policies to accommodate individuals with disabilities by claiming that it is acting against a manifestation of the disability rather than the disability itself. Here, Respondents contended that they were acting against an "excessive" dose of Ritalin, not against Kelly's disability which admittedly requires that dose of Ritalin. Yet, this "argument ignores the fact that the *sole* reason that [Kelly needs the medication] is due to [her] disability." *Dennin v. Connecticut Interscholastic Athletic Conference*, 913 F.Supp. 663, 669 (D. Conn. 1996)(emphasis original), *vacated on other grounds*, 94 F.3d 96 (2d Cir. 1996).

School districts cannot be permitted to avoid their statutory obligations to provide reasonable accommodations to students by hiding behind a policy or rule that purports to attack the medication or dose of medication needed to treat the disability rather than the disability, itself. "'To accept such an analysis would mean that any student who fails to meet such requirement [of needing below PDR-levels of medication] as a result of [her] handicap is not .... protected by the Rehabilitation Act' [or Title II.] [This] argument would result in the rule insulating itself from scrutiny." *Id.* (Citations omitted.)

CONCLUSION

The Eighth Circuit has now placed disabled students and school districts in an untenable position: under federal law, students with disabilities must be reasonably accommodated if necessary for them to benefit from the school districts' services and programs — yet, school districts in the Eighth Circuit may now, with impunity, avoid such statutory obligations simply by voicing wholly speculative concerns of harm and liability, thereby leaving disabled students without the reasonable accommodations to which they are indisputably entitled. Such reasoning is at odds with decisions of this Court and several U.S. Courts of Appeals (including the Eighth Circuit). Moreover, carried to its logical extension, such reasoning would permit school districts and other public entities to escape their statutory obligations in a host of other situations involving disabled persons (*e.g.*, wheelchair ramps for mobility-impaired students could be torn down because of speculative concerns of harm and liability, with the parent or guardian required to carry the child around the school).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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